SUPREME COURT, U.S.
MAR 13 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1382

RAYMOND A. KLEMMER,
Petitioner,

versus

STATE OF ALABAMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

J. PAUL LOWERY
Attorney at Law
Suite 800 - Bell Building
Post Office Box 411
Montgomery, Alabama 36101

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Raymond A. Klemmer, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Court of Criminal Appeals of Alabama rendered on the 14th day of August, 1973, which affirmed the conviction of RAYMOND A. KLEMMER for the State offense of grand larceny.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama has been reported at ____ Ala.App. ____, ___ So.2d ____, and a copy thereof appears in the Appendix.

JURISDICTION

The judgment of the Court of Criminal Appeals of Alabama was entered on the 14th day of August, 1973, and is annexed hereto in the Appendix, infra, p. 9a.

A timely application for rehearing in the Court of Criminal Appeals was denied, without opinion, on the ____ day of _____ 1973, and the judgment thereon is in the Appendix, infra, p. 10a.

A petition for writ of certiorari was filed within the time required by the laws of Alabama in the Supreme Court of Alabama, and this petition was denied, without opinion, on the 25th day of October, 1973. A copy of the judgment thereon appears in the Appendix, infra, at p. 11a.

The statutory provision believed to confer jurisdiction upon this Court to review the questions involved thereon appears infra, pp. 3-4.

QUESTIONS PRESENTED

I.

Can the Trial Judge properly charge the jury that "the unexplained possession of recently stolen goods

is a fact from which a jury may infer guilt ..." when there is no legal evidence that the defendant was in "possession" of stolen property, as that word is construed in its legal sense, or is such charge under such circumstances abstract, misleading, confusing and prejudicial?

II.

Can a conviction on a charge of larceny in the absence of evidence tending to show a felonious taking be proper?

CONSTITUTIONAL PROVISIONS INVOLVED

I.

Constitution of the United States, Amendment XIV, Section 1:

Section 1. ... nor shall any state deprive any person of life, liberty, or property, without due process of law; ...

II.

Title 28, Section 1257(3), United States Code:

Final Judgments or Decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

...

(3) By writ of certiorari, ... where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, ... the United States.

STATEMENT OF THE CASE

Petitioner was tried and convicted in the Circuit Court of Lee County, Alabama on the charge that he, "feloniously took and carried away one 1971 Monte Carlo Chevrolet automobile at a value of $4,000.00, the personal property of Bill Heard Chevrolet, a Georgia corporation, against the peace and dignity of the State of Alabama (Record, p. 1)." Petitioner was sentenced to serve ten years in the penitentiary (Record, p. 2). Said conviction was affirmed by the Alabama Court of Criminal Appeals on August 14, 1973. Application for Rehearing having been overruled, Petitioner then sought certiorari in the Supreme Court of Alabama which was denied on October 25, 1973 without opinion. Subsequently, Petitioner's Application for Rehearing on the Supreme Court's denial of a writ of certiorari to issue was denied on December 13, 1973. Hence this petition for writ of certiorari involves adequately presented and preserved questions.

REASONS FOR GRANTING THE WRIT

I.

The Petitioner seeks a writ of certiorari because the Alabama Supreme Court, in affirming the decision of the Alabama Court of Criminal Appeals, denied Peti-

tioner due process under the Fourteenth Amendment of the Constitution of the United States.

The emphasis in Petitioner's argument is upon basic fairness, that is, whether Petitioner received "that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941).

Under the developed facts Petitioner vigorously contends that there is no question but that there was insufficient evidence to conclude that Petitioner was ever in "possession" of the allegedly stolen automobile. The evidence at trial was that at the time of Petitioner's arrest, Petitioner was merely sitting in the allegedly stolen automobile, in an apparent attempt to crank the vehicle (Record, p. 28-29). The evidence further revealed that the only direction in which the vehicle could have been moved was quite effectively blocked by another automobile that was parked directly behind the vehicle in question. Thus, it would have been physically impossible for Petitioner to have exercised that degree of control or power over the vehicle in question that would amount to a larcenous taking.

Notwithstanding the fact that it was physically impossible for Petitioner to move the vehicle in question, the Trial Court charged the jury that the unexplained possession of recently stolen property was a fact from which they, the jury, might infer guilt (Record, p. 132). Of course, this would have been a perfectly good charge had there been sufficient evidence from which the jury could have inferred that the Petitioner was ever in "possession," within the technical meaning of

that word, of the allegedly stolen automobile. However, Petitioner would have had to have been found in "control" of the allegedly stolen automobile before he could be said to be in "possession" of same. Lacking the power to control either the use or disposition of the automobile, a statement to the effect that Petitioner was ever in "possession" of said automobile would amount to mere nonsense. As the car could not effectively be moved, there could be no dispossession of possession, and therefore no trespass on possession.

Thus, the Trial Court's charge to the jury was misleading in this regard because it assumed a fact that was not in evidence. It assumed, or allowed the jury to assume, that Petitioner was in "possession" of the car, and charged that an inference of guilt could be drawn therefrom. This was clearly erroneous, as such instruction cannot be said to have been hypothesized on the evidence.

Under these circumstances, Petitioner contends that it is more than likely that the jury would have acquitted him but for the Lower Court allowing an "inference of guilt" to be erroneously drawn, and thus a violation of due process was committed.

The crucial question for this Court to decide is whether the Trial Judge's action in so misleading the jury amounted to a denial of due process and fundamental fairness to Petitioner. Of course, there is no way to delve into the minds of the jurors to ascertain what degree of importance or significance was attached to the Trial Judge's oral instruction in this regard, how-

ever, it must be considered that the Trial Judge's oral instruction was potentially so prejudicial as to have "infringed [Petitioner's] fundamental right to a fair trial assured by the due process clause of the Fourteenth Amendment." *Estes v. Texas,* 381 U.S. 532 (1965). This Court should not be willing to say that it did not have some influence on the jury, thus affecting the substantial rights of Petitioner. Petitioner would have this Court apply its good judgment and common sense to this question, and in so doing reach the conclusion that there exists a very real possibility that the jury would not have returned a guilty verdict against Petitioner had they not been allowed "to infer guilt" from a fact (possession) which was never proved. All the while we ask this Court to keep in mind that the Trial Judge never instructed the jury as to the legal definition of "possession," thus making the oral instruction all the more prejudicial. Absent any explanation of this most difficult to understand term, when used in its legal sense, it can readily be assumed that the jury applied a layman's definition to "possession," and thus concluded that merely being in an automobile constituted some type of "possession."

The Fourteenth Amendment should be liberally construed to protect the substantial rights of the defendant. If this Court is bent on providing fundamental fairness for all citizens then it must necessarily hold in the case at bar that here there has been a violation of due process when the Court erroneously instructed the jury in the manner as aforementioned.

II.

The second question presented raises the question of whether or not there was substantial evidence tending to prove all of the elements of the crime of grand larceny, and in particular any evidence tending to show a felonious taking.

Petitioner invites the attention of the Court to the fact that the Record is utterly devoid of any evidence tending to show that Petitioner had any intent to permanently deprive or to feloniously take the automobile in question. It is abundantly clear that there was no evidence to indicate that Petitioner was aware that legal title to the automobile in question lay anywhere other than with himself until after his arrest. Should this Honorable Court see fit to grant this Writ, then the Court will have the opportunity to observe the evidence first hand. Suffice it to say for present purposes that Petitioner produced an unchallenged Bill of Sale; that Petitioner had arranged for repairs to be made to the automobile in his own name; that there was no one with a superior claim to the automobile in question known to Petitioner. In fact, the automobile was not established as "stolen" until the morning after Petitioner's arrest. Moreover, the Court will readily see that proof of ownership of the allegedly stolen property was never proved as alleged in the indictment, and such omission in the proof constituted a fatal variance in the *allegata* and *probata*.

Under these circumstances, Petitioner's motion to exclude the State's evidence should have properly been

granted, but instead was erroneously denied. Such denial constituted a violation of due process and fundamental fairness which should be accorded to every defendant in a criminal case.

CONCLUSION

WHEREFORE, Petitioner respectfully submits that this Court should grant the writ of certiorari prayed for herein.

J. PAUL LOWERY
Post Office Box 411
Montgomery, Alabama 36101

Of Counsel
Lowery and Pool
Suite 800 — Bell Building
Montgomery, Alabama

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of March, 1974.

J. PAUL LOWERY

APPENDIX

OPINIONS AND JUDGMENTS

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1972-73

5 Div. 92

Raymond A. Klemmer, alias

versus

State

Appeal from Lee Circuit Court

PER CURIAM

The appellant was convicted of grand larceny and sentenced to ten years imprisonment, from which judgment he appeals.

We think in view of the court's ruling on appellant's motion to exclude the State's testimony that a brief statement of the salient facts developed at the trial is appropriate.

The evidence presented by the State tends to show that on April 1, 1971, Bill Heard Chevrolet Company, Inc., of Columbus, Georgia, received delivery of

a Chevrolet automobile, 1971 Monte Carlo model, and stored it at one of the storage lots of the company. On April 14, 1971, the appellant delivered this automobile to the Jack Tatum Company in Opelika, Alabama, for certain repairs. The manager of the repair shop, H. E. Speir, in making a routine examination of the automobile, noticed that the serial number did not correspond to that stamped on the motor of the automobile and that the plate on the dashboard holding the serial number was held by only one rivet instead of the usual two, and further that the car did not appear to have been driven 39,000 miles as represented to Witness Speir by appellant. Subsequent investigation disclosed that the car was missing from the lot of the Bill Heard Chevrolet Company in Columbus, Georgia, and the car was later identified by the person in charge of the new automobiles on this lot as being the car which had been delivered to the company on April 1. On the night of April 14 Detective Fitzgerald of the Opelika Police Department encountered the appellant and one Doug Isbell near the impounding lot of the Opelika Police Department. He stopped the car in which they were riding, a Corvair, and inquired as to their purpose in being at the lot, which was off limits to the public. He advised them of this fact and Isbell in turn asked if the police had one Eugene Parker in jail or whether he was in the county jail. Witness answered Parker was not held in the city jail. They immediately left the vicinity of the impounding lot and were followed by Detective Fitzgerald who observed that they went only a few blocks and headed back toward the police station. He immediately turned his car around and came back to the police station at which time he ob-

served that someone was sitting in the car in question and that the Corvair in which appellant and Isbell had been was parked a short distance behind it. He further testified that the Chevrolet had made some movement in a backward direction at about the time he blocked the Corvair from moving out and that he immediately got out of the police car, approached the Monte Carlo with his pistol drawn, and placed appellant under arrest. Witness Fitzgerald further testified at the time he arrested the appellant he advised him of his constitutional rights and that the appellant had produced a bill of sale for the automobile and claimed that it belonged to him. It appears that immediately before the *Miranda* warning (*Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694) was given the appellant, the police officer asked him what he was doing there, or something to that effect, and the appellant stated that he had come to get his car.

Appellant's testimony was that the car in fact belonged to him, he having purchased it from one Nelson Cook in Montgomery on or about April 5 for the sum of $2,800.00. Appellant further testified that Nelson Cook represented himself to be connected with the Drennen Motor Company of Birmingham and that he received his bill of sale which was offered in evidence from Cook. He further testified that the car had a faulty transmission and that he had left it at the home of Witness Isbell until April 14 and that the car was parked in front of the Isbell home and in plain view of the street during this time. On April 14 he did deliver the car to Jack Tatum Company for repairs. Appellant further contends that the car belonged to him due to

his purchase of it from Cook and that his only object in appearing at the police station was to find his car and to take it back into his possession. Appellant testified that he was in fact at the police station three times. He was unable to find anyone at the police station the first time and on the other occasion Sgt. Fitzgerald had informed him and Mr. Isbell that Mr. Baggett, who had early in the day been arrested for possession of the car, was probably in the county jail and that on the final occasion he was seated under the steering wheel of the car with the switch key and lights on and the motor running. The officer drove up in front of the Corvair, got out of the police car, blocking its movement, came up to him with a pistol drawn and placed it at his head and had him give up the keys. He testified he did not remember whether he moved the car or not and, if so, how far because he was frightened by the officer with the drawn weapon. He further testified on the second occasion when he was at the police lot he saw the car in question but was not certain of its identity. In order to make certain that it was the right one, he came back to take a closer look and recognized it. Mr. Isbell substantiated this testimony in certain respects — that he drove the car back from Montgomery at the request of appellant on the night it was purchased, and that the car remained in front of his house until it was taken to the Jack Tatum Company for repairs. He was with appellant on the night he was arrested, and testified to the circumstances substantially the same as set out in the testimony of the appellant.

There were other details in regard to witnesses supporting the contention of plaintiff and appellant which are not necessary to delineate. The above statement will serve as a basis for the decision of the questions raised on appeal.

The indictment laid the ownership of the stolen vehicle to the Bill Heard Chevrolet Company, Inc., and it is the contention of the appellant that no proper proof of the existence of this Corporation was presented by the State; and further that there was no proof of the ownership by the corporation of the alleged stolen car.

Tit. 15, § 315, Code of Alabama 1940, Recompiled 1958, reads as follows:

> "In the trial of criminal cases it shall not be necessary for the state to prove the incorporation of any corporation mentioned in the indictment, complaint, or information, unless the defendant within thirty days after indictment, if defendant be under bond, or within thirty days after arrest on capias, denies the existence of such corporation by a sworn plea."

We find nothing in the record indicating that a sworn plea denying the legal existence was filed by appellant as authorized in the above quoted statute. Where the statute has not been complied with, the State is relieved of the burden of proving a corporation and the defendant cannot complain of the State's failure to prove its legal existence. *Johnson v. State*, 42 Ala. App. 611, 173 So. 2d 817, 277 Ala. 655, 173 So. 2d 824

(This case was reversed on other grounds.); *Childs v. State*, 43 Ala. App. 529, 194 So. 2d 861.

There was testimony by Mr. James Yarnall, Assistant Manager of Bill Heard Chevrolet, Inc., that the car found in appellant's possession belonged to the Bill Heard Chevrolet Company, Inc., and has never been sold at the time it was apprehended by the officers.

The appellant further argues that he never actually acquired dominion and control over the car so as to deprive the owner thereof. Under the testimony of Detective Fitzgerald, set out above, this was a question of fact for the jury and was properly submitted to them by the court. *Johnson v. State*, 41 Ala. App. 351, 132 So. 2d 485.

In *Arthur v. State*, 38 Ala. App. 490, 93 So. 2d 793, this Court in speaking of this proposition said:

> "Moreover, if the prospective thief shall have obtained at some particular time the complete, independent and absolute possession and control of the chattel, adverse to the rights of the owner therein, the taking is complete. 36 C.J. p. 748, Section 45(3). And 'a very slight asportation will be deemed sufficient.' Molton v. State, 105 Ala. 18, 16 So. 795, 796, 53 Am. St. Rep. 97. . . ."

In *Johnson v. State*, 41 Ala. App. 351, 132 So. 2d 485, the Court stated:

> "... It is immaterial how short the distance moved, or the length of time he exercised dominion over it. It may constitute larceny if there was a severance of the possession of the owner and an actual possession and removal by the wrongdoer. Phelps v. State, 6 Ala. App. 58, 60 So. 537; Molton v. State, 105 Ala. 18, 16 So. 795; Blakeney v. State, 244 Ala. 262, 13 So. 2d 430; Arthur v. State, 38 Ala. App. 490, 93 So. 2d 793."

We think this matter was a question for the jury to decide.

The court, over the objection of the appellant, allowed the witness Fitzgerald to testify that when he approached the automobile in which the appellant was sitting he asked the appellant in substance what he was doing there and that the appellant answered that he had come to get his car. Immediately thereafter the witness testified he recited the *Miranda*, supra, rights to appellant and placed him under arrest. Whether or not this statement by the appellant in answer to the officer's question amounted to an inculpatory admission or confession need not be decided for the reason that if there were error in its admission, it was harmless under Supreme Court Rule 45. The defense presented by the appellant was in fact based upon the claim that the automobile was his; he, having bought it from the witness Cook and paid the purchase price. As we see it, no error can result to the appellant by reason of this occurrence immediately before being arrested when his testimony thereafter reiterated and attempted to substantiate the claim.

The appellant excepted to that portion of the oral charge in which the court said that "the unexplained possession of recently stolen goods is a fact from which a jury may infer guilt and whether there is sufficient evidence of guilt is for the determination of the jury." In *Allred v. State*, 35 Ala. App. 66, 43 So. 2d 758, this Court stated:

> "The possession of recently stolen goods, without a reasonable explanation of such possession, is a fact from which the jury can infer guilt. The reasonableness of the possessor's explanation is for the jury. Dickey v. State, 32 Ala. 413, 26 So. 2d 532."

This principle has been adhered to in our appellate courts in many cases and seems to be the well established rule. *Bryant v. State*, 116 Ala. 445, 23 So. 40; *Heath v. State*, 30 Ala. App. 416, 7 So. 2d 579, cert. denied 242 Ala. 632, 7 So. 2d 580; *Wildman v. State*, 42 Ala. App. 357, 165 So. 2d 396, cert. denied 276 Ala. 708, 165 So. 2d 403. No error appears in the court's action excepted to.

At the request of appellant the court gave several charges in writing and refused charges 33, 11, 29, 23, 22, 25, 31, 30, 26, 5, 4, 2, 1 and 3.

Charges 26, 5, 4, 2, 1 and 3 were affirmative in nature and were properly refused under the evidence developed in this case.

Charges 33, 11, 29, 23 and 22 on reasonable doubt were adequately covered by the oral charge of

the court and certain given charges, as were charges 31 and 30 which dealt with character evidence.

Charge 25 was clearly erroneous and needs no discussion. There was no error in the court's refusal of any of the above requested charges of appellant.

Upon an examination of the record we find no error of a reversible nature in any part thereof and the cause is therefore affirmed.

AFFIRMED.

All the judges concur.

August 14, 1973

STATE OF ALABAMA

JUDICIAL DEPARTMENT

COURT OF CRIMINAL APPEALS

5 Div. 92

Raymond A. Klemmer, alias

versus

State

Appeal from Lee Circuit Court

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted

on briefs and duly examined and understood by the Court; it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed.

September 25, 1973

STATE OF ALABAMA

JUDICIAL DEPARTMENT

COURT OF CRIMINAL APPEALS

5 Div. 92

Raymond A. Klemmer, alias

versus

State

Appeal from Lee Circuit Court

It is hereby ordered that the application for rehearing be and the same is hereby overruled.

STATE OF ALABAMA
COUNTY OF MONTGOMERY

I, Mollie Jordan, Clerk of the Court of Criminal Appeals, do hereby certify that the foregoing pages numbered from one through ten, both inclusive, contain

a full, true and correct copy of the Court opinion, judgment and order on application for rehearing in the cause of 5 Div. 92, Raymond A. Klemmer, alias v. State of Alabama, as the same appears and remains of record and on file in this office.

Witness my hand with the seal of the Court attached this 12th day of February, 1974.

/s/ MOLLIE JORDAN
Clerk of the Court of
Criminal Appeals of Alabama
(SEAL)

THE STATE OF ALABAMA

JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA
OCTOBER TERM 1973-74

SC 563

Ex Parte: Raymond A. Klemmer, Petitioner
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Raymond A. Klemmer v. State)

Comes the petitioner, and the Petition for Writ of Certiorari to the Court of Criminal Appeals being submitted and duly examined and understood by the

Court, it is considered and ordered that the petition for writ of certiorari be, and the same is hereby, denied, and the petition be, and the same is hereby, dismissed at the costs of the petitioner, for which costs let execution issue.

IT IS ORDERED, that the application for rehearing filed in this Court on November 9, 1973, be, and the same is hereby, denied.

STATE OF ALABAMA
MONTGOMERY COUNTY

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a true and correct copy of the orders of the Supreme Court of Alabama in the cause of SC 563, Ex Parte: Raymond A. Klemmer, as the same appears of record and on file in this Court.

WITNESS: my hand and the Seal of the Supreme Court of Alabama, this the 12th day of February, 1974.

/s/ J. O. SENTELL
J. O. Sentell, Clerk

(SEAL)